

NTSB Order No. EA-3684

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 20th day of September, 1992

Respondent .

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Field Airport, Grand Junction, CO, on March 30, 1988. In his order of suspension, the Administrator claimed that respondent violated Sections 91.75(b), 91.87(b), and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91), in failing to maintain two-way radio contact with the tower prior to takeoff, and in failing to follow air traffic control ("ATC") instructions.<sup>2</sup> Respondent was given clearance to take off but, because of an incoming aircraft, that clearance was allegedly withdrawn, and respondent was directed to hold short of the runway.<sup>3</sup> It is undisputed that respondent did not do so, and did

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<sup>2</sup>§ 91.75(b) (now 91.123) provided:

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

§ 91.87(b) (now 91.129(b)) read:

(b) Communications with control towers operated by the United States. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, the pilot in command may operate that aircraft and land if weather conditions are at or above basic VFR [visual flight rules] weather minimums, visual contact with the tower is maintained, and a clearance to land is received. . . .

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>This airport had no radar, and the only method of

not answer the tower's repeated calls. His takeoff caused ATC to divert the incoming aircraft.

In support of his allegations, the Administrator offered testimony from the two controllers working the tower at the time.

They confirmed that the tower tape and transcript (Exhibits C-2 and 3) accurately reported their conversations with respondent and others, although they could not confirm that the time of each transmission, as shown on the transcript, was accurate. Witness Stephens, who was performing local and ground control functions, confirmed that the transcript accurately indicated that, after takeoff clearance was given, he broadcast a number of times (and on more than one frequency) to have respondent hold short, and that no response was received. He also testified that he flashed a red light at the aircraft, and flashed the runway lights to try to get respondent's attention, to no avail. Tr. at 46-55.

Respondent denied the charge, alleging that he heard no ATC transmissions after his aircraft was cleared for takeoff. His copilot on the flight agreed. Respondent suggested that the problem lay with the tower's radio equipment, or with the performance of the controllers. Tr. at 99, 155. Respondent also alleged that irregularities in the tower tape made it (and the

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determining the position of incoming aircraft was a call from the pilot. Here, a call from an incoming aircraft shortly after respondent was cleared for takeoff indicated that, if both proceeded without adjustment, separation would be lost. The testimony indicates that ATC personnel were seriously concerned about a mid-air collision. Tr. at 55, 73.

transcript produced from it) unreliable, and that the case should be dismissed due to FAA improprieties in connection with the tape. For example, he suggested that the timing of the instruction to hold short was not as stated by the controllers and as shown on the transcript, but that the instruction to hold short was given after the aircraft had taken off. Tr. at 11.<sup>4</sup>

The law judge found that respondent had violated § 91.87(d) in failing to maintain two-way radio communications, and also found a violation of § 91.9. He noted no evidence that respondent's radios had malfunctioned.<sup>5</sup> However, he concluded that § 91.75(b) and § 91.87(d) were mutually exclusive. He reasoned that no respondent could be found to have violated an ATC instruction if he is also found not to be in radio contact (i.e., if you do not hear an instruction, you can not violate

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<sup>4</sup>Equipment at Grand Junction did not permit copying of the tower tape in a way that would preserve the different channels of transmissions or the digital time recording. ATC had a small cassette recorder and used that, with a microphone. The result was a tape in which different channels were overlapped. ATC did not preserve the original tape after the 15-day period prescribed, although exactly when it was reused was not clear on the record. Respondent made a Freedom of Information Act ("FOIA") request for the tape. Although the request was received on the 16th day, it appears that the FAA made no effort to ensure, if the tape had not yet been reused, that it would not be.

Respondent claimed that the original tape should have been preserved, and that, because the re-recording was not made in accordance with FAA procedures, it should not be used. Allegedly, the destruction of the original denied respondent whatever chance he might have had to produce documentary evidence confirming his version of events.

<sup>5</sup>This was not alleged. Respondent admitted that he had had

it).

In response to respondent's concerns about the tape and transcript, the law judge found them reliable, but stated that, even if a different procedure had been used to produce the tape, the result would not have changed.<sup>6</sup> For two reasons, the law judge reduced the suspension from the proposed 60 days, to 20 days. First, the reduction reflected dismissal of the § 91.75(b) claim. Second, he determined that ATC action contributed to the incident, "in clearing him for takeoff when another aircraft is inbound on the same heading." Tr. at 166.

We address respondent's appeal first. He identifies three errors in the law judge's § 91.87(b) finding, the first of which is that the evidence does not support the conclusion. We disagree.

As the Administrator notes in his appeal, the regulations identify only one affirmative defense to this charge -- in-flight radio failure. Radio failure is not even alleged here. The two involved controllers stated that respondent did not heed the calls to hold short, or the flashing red or runway lights. Respondent and his copilot denied hearing any transmissions.<sup>7</sup>

(..continued)  
no communications problems. Tr. at 112.

<sup>6</sup>He also found that the FAA was not at fault in handling the FOIA request, as it arrived after the date the tape could be reused.

<sup>7</sup>In fairness, we note that respondent would have had his back to the tower, and therefore to the red flashing light. He also testified that he did not appreciate the significance of the

Thus, the question becomes one of witness credibility, and respondent fails to show, as required, that the law judge's assessment was arbitrary or capricious. Administrator v. Smith, 5 NTSB 1560, 1563 (1987).<sup>8</sup>

There is also no basis to sustain respondent's suggestion (Appeal at 6) that the controllers' transmitter was not functioning. Respondent failed to rebut the Administrator's evidence showing that respondent had received earlier ATC transmissions. Furthermore, there were no reported problems with the tower radio equipment.<sup>9</sup>

Respondent next argues that, because the FAA violated its own procedures for tape retention and copying, either the case should be dismissed or we should presume that a proper copy of the tape would have provided evidence favorable to respondent. Respondent's third argument duplicates the second. He claims a lack of due process from the handling of the tape, and insists  
(..continued)  
flashing runway lights.

<sup>8</sup>We reject respondent's suggestion that, because the transcript had no reliable times, and because the controllers' evidence depended entirely on the tape and transcript, there was no basis to conclude that the instruction to hold short was given before the aircraft was airborne. This mischaracterizes the evidence and the testimony. The controllers testified categorically that the hold short instructions were given prior to respondent's takeoff, and the details they offered indicate a recollection of events far more specific than the tape and transcript could provide. Moreover, and especially in view of the controllers' extensive testimony, respondent makes more of the lack of time evidence than it merits. See infra.

<sup>9</sup>Difficulties ATC had in contacting the incoming aircraft were satisfactorily explained. Tr. at 73-74.

the complaint be dismissed.

We agree with the law judge that the FAA did not violate its tape retention procedures although, as noted earlier (see footnote 4), we think additional efforts should and could have been made. Given all the facts of record, we decline to make a presumption favorable to respondent as a result of the FAA's action.

And, as did the law judge, we can find no violation of any internal FAA instructions regarding tape copying. Paragraph 573 does not require that copying equipment be capable of separate copying of the different frequencies, and the transcript, which "unscrambled" the re-recording to eliminate overlap, was certified accurate by the transcriber and the two controller witnesses. Moreover, any missing or unintelligible phrases are not critical to the issues before us and do not detract from the remaining portions of the transcript.

In addition, the fact that the separate frequency containing the times of the transmissions was not reproduced is not critical. Again, it is not required by the FAA manual, nor does its absence compromise the Administrator's presentation.<sup>10</sup> The times in the transcript were arrived at by using a beginning time from the tape, and measuring in real time thereafter. Tr. at 23-

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<sup>10</sup> Respondent argues that separate recording of each channel is required, but the rule he cites (7210.3I manual, § 4, ¶ 341) refers to the original, not the re-recording.

25.<sup>11</sup> Thus, any differential between the original tape and the transcript times should be minor, at most. Accordingly, respondent's due process arguments are misplaced and do not warrant the relief sought.

Turning to the Administrator's appeal, we find that the § 91.75(b) violation was proven by substantial evidence and that the law judge's analysis was in error. As noted earlier, the only regulatory exception to compliance with an instruction is in-flight radio malfunction. Here, it is clear that respondent's radios were working, and we have rejected the claim that the tower transmissions were not being broadcast. There are various other possibilities that would explain respondent's failure to acknowledge and abide by the instruction to hold short. For example, the radios may have been tuned to other frequencies. Contrary to the law judge's analysis, none of the possibilities excuses respondent's failure. He is required to have operating radios at this airport so that he can maintain two-way radio communication. Whether radio frequencies are mis-selected, whether a pilot does not hear because his attention is elsewhere, or whether he hears a transmission but chooses to ignore it, is irrelevant. An ATC instruction was violated. As the Administrator points out (Appeal at 15), the law judge's

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<sup>11</sup>Contrary to respondent's allegations, the voice activation capability of the microphone was not in use. The cassette recorder could not accommodate it. That the tape is in "real time" is confirmed by hearing it, as it contains silent spaces.



construction would lead to avoidance of all ATC instruction violations simply by claiming that they were not received. Not only is this a strained reading, but it is inconsistent with our prior interpretation of the rule. See Administrator v. Reid, 1 NTSB 620 (1969) (piloting of aircraft with no radio and resultant failure to comply with light signals from the tower resulted in violations of § § 91.75(b) and 91.87(b)).

The last matter requiring attention is the Administrator's request that we reinstate a 60-day suspension. We decline to do so, and affirm the law judge's reduction to 20 days. We do this, however, for a reason different from that cited by the law judge. Without attempting to evaluate the law judge's concern that the controllers contributed to the incident, we are satisfied that a 20-day suspension is more consistent with precedent. See, e.g., Administrator v. Fields, 4 NTSB 512 (1982) (15-day suspension for violation of § § 91.75(a) and (b), 91.121(a), and 91.9); Administrator v. Honan, 4 NTSB 418 (1982) (15-day suspension for violations of § § 91.75(a) and 91.9); and Administrator v. Roetman, 3 NTSB 4023 (1981) (15-day suspension for violations of § § 91.83(d) and 91.87(b)). Compare Administrator v. Stifel, 3 NTSB 3536, 3538 (1981) (60-day suspension for violations of § § 91.75(b), 91.87(h), and 91.9, when violations found to be "deliberate and flagrant").

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted to the extent discussed in this opinion;
3. The 20-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.<sup>12</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>12</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).